93-681

No. _____

Supreme Court, U.S.
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In The

Supreme Court Of The United States

October Term, 1993

PAUL R. VITARELLI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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October 29, 1993

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QUESTION PRESENTED

(1) Whether the United States District Court's failure to exclude opinion evidence offered by FBI Agents strongly suggesting the petitioner's guilt of crimes charged constitutes reversible error?

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LIST OF PARTIES

The parties to the proceeding below were the Petitioner, Paul R. Vitarelli, Joseph J. Santopietro, Perry A. Piscotti, Robert A. Giacomi, Jack R. Giacomi, Fred L. Giusti and Thomas E. Porzio.

The Respondent before this Court includes solely the United States of America.

No._____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

PAUL R. VITARELLI, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

The petitioner, Paul R. Vitarelli, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 996 F.2d 17, and is reprinted in the appendix hereto, p. 1a-21a, infra.

JURISDICTION

The judgment and opinion of the Court of Appeals in this matter was entered on June 9, 1993. On July 29, 1993, a timely petition for rehearing filed by co-defendants, Joseph J. Santopietro and Perry A. Piscotti, and adopted by the petitioner, was denied by the Court of Appeals. App. B, infra, 22a-28a. The appeal is being docketed in this Court within ninety days from the denial of the petition for rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

FEDERAL RULE INVOLVED

Rule 702 of the Federal Rules of Evidence provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

STATEMENT OF THE CASE

A. Procedural History

The United States District Court for the District of Connecticut had jurisdiction pursuant to Title 18, U.S.C. §3231.

On September 24, 1991, the petitioner, President of the Board of Aldermen for the City of Waterbury, Connecticut was indicted by a grand jury and charged with conspiracy, in violation of 18 U.S.C., §371; three counts of bribery in violation of 18 U.S.C., §666; and, making a false statement on a tax return filed

with the Internal Revenue Service in violation of 26 U.S.C., §7206(1). Jury trial of this defendant and six other defendants, including the Mayor of the city, Joseph J. Santopietro, began on February 25, 1992, and concluded with the jury returning guilty verdicts against this petitioner on one count of bribery, the I.R.S. count, and the conspiracy count on April 2, 1992. On June 5, 1992, the petitioner was sentenced to the custody of the Attorney General for a term of 41 months. A timely notice of appeal was filed on June 11, 1992. On June 9, 1993, the Court of Appeals for the Second Circuit affirmed the petitioner's conviction. On July 29, 1993, a petition for rehearing with suggestion for rehearing en banc was denied.

The petitioner and the co-defendants were prosecuted for political corruption. Petitioner was the President of the Board of Aldermen in the City of Waterbury, Connecticut. He was indicted, along with the Mayor of the city, Joseph J. Santopietro, and other political figures. The essence of the government's case rested upon a conspiracy charge alleging that Mayor Santopietro and defendant Perry A. Piscotti, after the election of Santopietro, entered into an agreement with various bank officials who became government witnesses during the prosecution of the case. The agreement provided that the Mayor and his assistant, Piscotti, would be compensated by the bank in the form of loans and cash payoffs disguised in the form of real estate transactions involving nominees and other artifices. In return, the Mayor and Piscotti

allegedly promised to exercise their influence over various political matters concerning land held by the officials at the bank to obtain favorable zone changes and subdivision approvals. According to the government, the agreement, originally hatched in 1986, expanded in 1988 to include the petitioner and others. The petitioner presided over the Board of Aldermen meetings as President and heard matters involving the bank officials and their properties. Besides the charge of conspiracy, the petitioner was indicted for three counts of bribery in violation of 18 U.S.C. §666. The only bribery transaction that the petitioner was convicted of was known as "PVG." The denomination PVG during the trial characterized a real estate transaction, wherein the petitioner received the sum

of $12,000 from a real estate closing paid by defendant Piscotti after Piscotti, inter alia, sold an option he held on a parcel of real estate for a substantial gain. The proceeds from the transaction via financing were provided by the bank headed up by the aforementioned officials. The government alleged that this payment to the petitioner violated 18 U.S.C. §666 and the petitioner was convicted on this count.

At trial, during the cross examination of F.B.I. Agent Clark, he offered his opinion on various transactions specified in the indictment involving defendant Santopietro, other indictees, and the petitioner, Vitarelli. He testified as follows:

> Q: Now, you don't like any of these transactions. That's been your testimony, correct?
>
> A: I feel that there's bank fraud, money laundering, and corrupt payment in several of these

transactions.

2/28/92 Tr. at 145.

Counsel for defendant Santopietro promptly objected and moved to strike Agent Clark's answer. In light of limiting instruction given by the trial court, this portion of the testimony is not challenged. It is only offered for context.

The devastating impact of the agent's opinion testimony came out on redirect where the balancing effect of the trial court's limiting instruction was entirely diluted by the following testimony, given over defense objection:

> Q: Now, at some point in your cross-examination, Mr. Clark, you referred to the term money laundering. Would you tell the ladies and the gentlemen of the jury what you meant by the term, money laundering?
>
> MR. HUGH KEEFE: I object, Your Honor. This is something that Your Honor will instruct the jury on.

THE COURT: Oh, I will probably, but I think he can describe what he means by it.

A: Okay. A money launder or money laundering would be where monies obtained through some type of illegal activity and that same money is -- financial transaction takes place, and the purpose of that transaction is either to disguise either where the money came from or where the money ends up.

Q: And is that also known colloquially as washing the money?

A: Yes.

Q: Now, you also referred, Mr. Clark, to the term corrupt payments. Do you recall that?

A: Yes.

Q: Is that a shorthand or something?

A: It is a shorthand for anything of value.

Q: And where was the term derived from, that is, where did it come from?

A: It comes from the statute which is Title 18, U.S. Code 666.

3/3/92 Tr. at 12. (Emphasis supplied)

The effect of this opinion testimony upon the jury was immense and ultimately led to the conviction of the petitioner.

Further manifestly prejudicial to the petitioner was the Court's allowance of opinion testimony on whether the petitioner's filing of an amended tax return could serve as a defense to the charge of subscribing to a false tax return in violation of 28 U.S.C. §7206(1). The charge arose from the petitioner's failure to report proceeds from a real estate transaction known as Hitchcock Court on his 1988 I.R.S. return. The petitioner filed an amended return in June of 1991. During the cross-examination of F.B.I. agent Mancinone, the following testimony was elicited:

> Q: Now, there's been some testimony and identification of various amended income tax returns, Mr. Mancinone.

A: Yes.

Q: The defendants who are charged with income tax violations arising from the Hitchcock Court transaction are who?

A: Jeffrey Santopietro, Robert Giacomi, Jack Giacomi, Paul Vitarelli.

Q: And what is the alleged violation with which they are charged?

MR. FAZZANO: Objection.

THE COURT: Overruled.

A: Subscribing to a false tax return.

BY MS. FITZSIMMONS:

Q: And to the best of your knowledge, Mr. Mancinone, is the filing of an amended tax return a defense to a charge of subscribing to a false tax return?

MR. HUGH KEEFE: Objection.

MR. CRAMER: Objection.

MR. JOSEPH FAZZANO: Objection.

THE COURT: Objections overruled.

A: No.

2/26/92 Tr. at 124.

The failure of the Court to exclude the opinion testimony of government FBI witnesses constituted prejudicial error. The petitioner's application for certiorari rests upon these evidentiary questions.

REASONS FOR GRANTING THE PETITION

I. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

In the petitioner's appeal to the United States Court of Appeals for the Second Circuit, he raised the opinion testimony issue as did defendants Piscotti and Santopietro who are also filing a petition for certiorari. The Court, however, (Pratt, Jacobs and Knapp) failed to address their claims in its opinion. App. A, infra 1a-21a. As a result, the Court sanctioned the

District Court's admission of the opinion testimony. At the time of the elicitation of the testimony, the jurors were told by the FBI agents that: a) money received by the petitioner was laundered and its receipt fell within the net of 18 U.S.C. §666; and, b) that the filing of an amended tax return was not a defense to 28 U.S.C. §7206. The agents testimony, in the form of an opinion, strongly conveyed an impression to the jury that the petitioner was guilty. The agent, in classifying the payment to the petitioner as laundered money, so buttressed the claims of the government that the prejudice and spectre of guilt aroused by the testimony cemented the convictions of the petitioner. The government will not and cannot claim that the structure of the PVG real estate venture that the petitioner involved himself in was

illegal. Therefore, the weight of the opinion testimony in the area of laundered money was crushing. Moreover, on the IRS charge, the testimony of the agent instructed the jury that the filing of an amended tax return was not a defense. His testimony directly conveyed an opinion as to the petitioner's guilt, and guided the jury on what verdict to return.

The petitioner does not take the position that all expert opinion testimony from a law enforcement agent is per se inadmissible. It is clear that the various circuits of this nation permit opinion testimony from law enforcement officers in complex cases for specialized reasons: 1) to aid the trier of fact; and, 2) to inform the jury of the components of a subject matter outside of their normal ken. See, United States v. Anguilo, et al., 897

F.2d 1169, 1189 (1st Cir. 1990) testimony of FBI agent on structure of organized crime family admissible; Perkins v. Volkswagen of America, 596 F.2d 681, 682 (5th Cir. 1979) testimony of specialist in mechanical engineering admissible; United States v. Rollins, et al.,862 F.2d 1282, 1291-1292 (7th Cir. 1991) testimony of FBI agent on narcotic code words admissible; United States v. Cerone, et al., 830 F.2d 938, 951 (8th Cir. 1987) testimony of FBI agent on the use of code names in prosecution under 18 U.S.C. §371, 1952, admissible; United States v. Christophe, 833 F.2d 1296, 1300 (9th Cir. 1987) testimony of FBI agent as expert on fingerprints admissible; United States v. Taren-Palma, 997 F.2d 525, 531 (9th Cir. 1993) testimony of police officer translating spanish conversation to english admissible; United States v.

Pinelli, 890 F.2d 1461, 1467-1468 (10th Cir. 1989) testimony of FBI agent on rules of participants in gambling operation admissible; United States v. Harris, 903 F.2d 770, 775-776 (10th Cir. 1990) testimony of FBI agent on interpreting records as "drug records" admissible; United States v. Cross, et al., 928 F.2d 1030, 1049 (11th Cir. 1991) testimony of FBI agent Lanning that photos in pedophile case were obscene admissible.

The holdings of the above cases - expert opinion testimony is admissible in complex cases dealing with complicated subject matter outside the normal ken of an average juror - has been followed by the Second Circuit. See, United States v. Gotti, et al. Nos. 92-1382, 92-1384, 92-1671, 93-1181 (2d Cir. filed Oct. 8, 1993) testimony of FBI agent on nature and function of

organized crime families, imparting structure of such families and disclosing rules of La Cosa Nostra admissible; United States v. Ruggiero, et al., 928 F.2d 1287, 1304 (2d Cir, 1990) testimony of FBI agent interpreting words used by organized crime members admissible; United States v. Brown, 776 F.2d 397 (2d Cir. 1985) cert. denied, 475 U.S. 1141, 100 S.Ct. 1793, 90 L.Ed. 2d 339 400-402 (1986) police officer permitted to describe a typical drug buy in Harlem, where the accused's defense was that he was on the scene but unaware of any drug transaction.

The case at bar, however, does not come within the parameters of the above cases where certain forms of opinion testimony were allowed. Moreover, a vein of discernable case law in the second circuit completely supports the

petitioner's argument that the admission of the agents' opinion testimony was manifestly erroneous. The failure of the United States Court of Appeals for this circuit to even address the following cases as applied to the instant petition constitutes such an unusual departure from the usual course of judicial proceedings to warrant this Court's exercise of certiorari.

In United States v. Scop, 846 F.2d 135 (2d Cir. 1988), the Court reversed 13 mail fraud and security fraud convictions because the trial court had permitted an expert witness to testify to his opinion that:

> ... stock of European Auto Classics was manipulated and that certain individuals were active participants and material participants in the manipulation of that stock. And that these individuals engaged in a manipulative and fraudulent scheme in furtherance of that manipulation.

846 F.2d at 138.

The United States Court of Appeals for the Second Circuit reversed on the basis of this testimony reasoning:

> Had Whitten merely testified that control buying and selling of the kind alleged here can create artificial price levels toward outside investors, no sustainable objection could have been made. Instead, however, Whitten made no attempt to couch the opinion testimony at issue and even conclusory factual statement but drew on the lines of the statute and accompanying regulations concerning "manipulation" and "fraudulent" ... In essence, his opinions were legal conclusions that were highly prejudicial and went well beyond his province as an expert in securities trading. Moreover, because his opinions were calculated to "invade the province of the Court to determine the applicable law and to instruct the jury as to that law," ... they could not have been helpful to the jury in carrying out its legitimate functions. "The admission of such testimony would give the appearance that the court was shifting to the witnesses' responsibility to decide the case."

846 F.2d at 140.

In Hygh v. Jacobs, 961 F.2d 359 (2d Cir. 1992), the court found error in the District Court's decision to admit an

expert witness in a police brutality case to express his opinion, inter alia, that the defendant police officer's conduct was not "justified under the circumstances, ... and totally improper." 961 F.2d at 364. The court stated:

> This Circuit is in accord with other circuits in requiring exclusion of expert testimony that expresses a legal conclusion ... Even if the jury were not misled into adopting outright a legal conclusion proffered by an expert witness, the testimony would remain objectionable by communicating a legal standard - explicit or implicit - to the jury ... whereas an expert may be uniquely qualified by experience to assist the trier of fact, he is not qualified to compete with the judge in the function of instructing a jury.

961 F.2d at 363-64.

Buttressing Scop and Hygh, is the case of United States v. Cruz, 981 F.2d 659 (2d Cir. 1992). In Cruz, the court reversed a narcotics conviction where the government had used expert testimony to bolster a cooperating witness'

testimony. Specifically, in Cruz, the government's expert, Morano, had testified about the manner in which narcotics transactions were conducted in the Washington Heights area of Manhattan. This testimony paralleled the testimony of a government informer, LaBoy, about the particular transactions at issue in this case. In reversing the conviction, the court stated:

> [A]lthough such expert testimony logically adds nothing to the believeability if a witness's account (again absent a suggestion of implausibility), it strongly suggests to the jury that a law enforcement specialist ... believes the government's witness [t]o be credible, and the defendant to be guilty, suggestions we have previously condemned. See United States v. Scop, 846 F.2d 135, 139-43 (2d Cir. 1988).

In Andrews v. Metro North Commuter R. Co., 882 F.2d 705 (2d Cir. 1989), the U.S. Court of Appeals for the Second Circuit vacated the judgment in favor of

the plaintiff ruling that a forensic engineer should not have been permitted to testify as an expert on behalf of a pedestrian that a train platform was slippery and that the pedestrian's conduct in walking along the railroad tracks was reasonable; in addition, the Court held that the forensic engineer should not have been permitted to state the railroad was negligent.

882 F.2d at 708-710.

In Andrews the Court stated as follows:

> [A]lthough the admission of expert testimony is ordinarily committed to sound discretion of the District Court, the exercise of such discretion is not without its limits ... such limits were exceeded in the instant case.

882 F.2d at 710.

Case law from other Appellate Circuits supports the contention of the petitioner that opinion testimony citing a legal conclusion invading the province

of the jury should be excluded. In United States v. Benson, 941 F.2d 598 (7th Cir. 1991), convictions for willfully failing to file income tax returns in violation of 26 U.S.C. §7203, tax evasion in violation of 26 U.S.C. §7201, were reversed. Here, the defendant failed to file tax returns for the years 1980 and 1981 regarding proceeds he was paid by an insurance company in the capacity as an investigator. The defendant was also fraudulently collecting social security disability benefits while working. At trial, the government utilized the services of an IRS agent named Cantzler. His purpose was to summarize the government's trial evidence and give his expert opinion as to why that evidence showed that Benson was required to file income tax returns for the years 1981. During his testimony, the agent gave his opinion that the payments from

underwriters in this Social Security Administration in 1980 and 1981 were gross income. The defendant at trial had claimed that he had never received the funds for investigative services but rather they were the result of a settlement against the insurance company. The agent also opined that the defendant was not entitled to receive social security disability benefits. The court reversed the convictions of the defendant stating that:

> Much of Cantzler's testimony consisted of nothing more than drawing inferences from the evidence that he was no more qualified than the jury to draw ... The ultimate question concerning social security benefits was whether Benson received those benefits knowing he was not entitled to them...

941 F.2d at 604-605.

In Benson, the court addressed the issue of harmless error as follows:

> The government however, has placed all its bets on the argument that Cantzler's testimony was proper; it

> is not argued that even if it was error to admit that testimony, the error was harmless ... Despite the District Court's opinion that the error was harmless, ... we are not prepared to say from an unguided search of the lengthy trial record that admitting Cantzler's testimony was harmless ... It may be that Cantzler's status as an expert boasted the credibility of those witnesses enough to make a difference to the trial's outcome.

941 F.2d at 605.

In United States v. Dicker, 853 F.2d 1103 (3d Cir. 1988), the defendant's conviction for conspiring to export defense articles in violation of 22 U.S.C. §2778(b)(2) was reversed. The court held that allowing an undercover customs agent to testify under the "lay opinion" rule to the illicit meaning he ascribed to the defendant's potentially legitimate offer to pay agent $50,000.00 for obtaining export certificates on an expedited basis constituted reversible error. The court stated that the agent "simply ascribed his own illicit meaning

to straightforward, potentiality legitimate statements. This admission was surely prejudicial and not helpful to clear understanding of the testimony." 853 F.2d at 110.

In Strong v. E.I. DuPont de Nemours Co., Inc., 657 F.2d 682 (2d Cir. 1981), a products liability action was brought on behalf of decedent Carl Strong by his administratrix, Bessie. At the close of evidence a directed verdict entered for the manufacturer. On appeal the Court of Appeals held that the trial Court did not abuse its discretion in refusing to permit an expert to testify that in his opinion various communications between manufacturers of plastic pipe and connecting device to natural gas company did not provide adequate warnings and instructions. F.2d 685-686. In upholding exclusion of the testimony, the Court stated as follows:

> "... in addition to these considerations, we note that the question of whether the lack of warnings rendered DuPont and McMurray products unreasonably dangerous is not the kind of issue on which expert assistance is essential for the trier of fact. The jury was capable of drawing its own inferences from the available evidence.

667 F.2d at 686.

The above cases demonstrate that not all opinion testimony is per se admissible. When applied to the case at bar, it is clear that the opinions offered by the FBI agents fall with the proscription of these cases. Here the agent informed the jury that the petitioner's receipt of money was corrupt and in violation of 18 U.S.C. §666. In addition, the jury was told by a second agent that the filing of an amended tax return was not a defense to a violation of 28 U.S.C. §7206(1). This testimony was damning to the petitioner and should have been

excluded as per the above cases.

Further support for the petitioner's position can be found in this Court. United States v. Johnson, 63 S.Ct. 1233, 319 U.S. 503, 87 L.Ed. 1546, rehearing denied 64 S.Ct. 25, 320 U.S. 808, 88 L.Ed. 488 (1943). In Johnson, the expert testimony of an IRS agent was found not to be prejudicial, but this Court stated as follows:

> ... so long as proper guidance by a trial court leaves the jury free to exercise its untrammeled judgment upon the worth and weight of testimony, and nothing is done to impair its freedom to bring in its verdict and not someone else's, we ought not to be too finicky or fearful in allowing some discretion to trial judges in the conduct of a trial and an appropriate submission of evidence within the framework of familiar exclusionary rules.

319 U.S. at 519-520.

In a second tax evasion case, Friedberg v. U.S., 75 S.Ct. 138, 348 U.S. 142, 99 L.Ed. 188, rehearing denied 75 S.Ct. 334, 348 U.S. 932, 99 L.Ed.

731, (1954) the Court held that the testimony of a government witness, on cross-examination, that he had not included any cash on hand including petitioner's net worth, because he found no evidence that the petitioner had any cash on hand, was not a mere conclusion which invaded the province of the jury. However, the court stated as follows:

> This was hardly a "conclusion of the witness," which is "an ultimate issue to be decided by a jury" as petitioner claimed. The agent, on petitioner's insistence, was testifying to a negative fact: he had not included cash because he found no evidence of cash. The evidence which he then summarized on redirect was only that which had already been introduced at the trial. It is difficult to see how he invaded the province of the jury; nor do we see how petitioner's question could have been answered otherwise.

U.S. 348 at 145.

What can be extrapolated from these two cases is that this Court does not sanction expert opinion testimony

invading the province of the jury. In the instant case, it is clear that the opinion testimony of the agents contained their opinion of the petitioner's guilt. As noted by the Advisory Committee to the Federal Rules of Evidence:

> Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed.

Fed.R.Evid. 704 advisory committee's note (Emphasis added)

The advisory committee's comments were illustrated poignantly in the case

of Marx & Co. v. Diners' Club, Inc., 550 F.2d 505 (2d Cir.), cert. denied, 434 U.S. 861, 98 S.Ct. 188, 54 L.Ed. 2d 134 (1977). In Marx, the plaintiffs alleged that the defendant committed securities fraud and breached a contractual obligation to register stock received by plaintiffs in exchange for their shares. The expert witness was permitted to give his opinion as to the legal obligations of the parties under the contract for registration of stock. The Court of Appeals held, inter alia, that the trial Court erred in permitting an expert witness to give his opinion. The Court stated as follows:

> The basis of expert capacity, according to Wigmore (§555), may "be summed up in the term 'experience.'" But experience is hardly a qualification for construing a document for its legal effect when there is a knowledgeable gentleman in a robe whose exclusive province it is to instruct the jury on the law. The danger is that the jury may think that the "expert" in the

> particular branch of the law knows more than the judge - surely an inadmissible inference in our system of law.

Marx, 550 F.2d at 512.

The petitioner respectfully asserts that the testimony of the agents in the case at bar crossed an impermissible line where his right to a fair trial was gravely prejudiced.

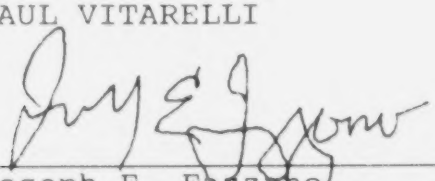
In affirming Mr. Vitarelli's convictions, the United States Court of Appeals for the Second Circuit ignored the arguments submitted herein and failed to address applicable case law in its' own jurisdiction, case law from other circuits and of this Court. In so doing, the Court radically departed from the accepted and usual course of judicial proceedings in violation of Rule 10(a) of the Supreme Court Rules.

CONCLUSION

Based upon the foregoing, the petitioner, Paul R. Vitarelli pleads for the mercy of this Court to correct the injustice that has occurred and to grant certiorari to review the merits of his claim.

Respectfully submitted,

THE PETITIONER,
PAUL VITARELLI



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APPENDIX

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APPENDIX A

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APPENDIX B

Ruling By United States Court
Of Appeals On Petition For
Rehearing (July 29, 1993).....22a-24a

APPENDIX C

Notice Of Motion For Adoption
Of Petition For Rehearing,
Filed July 30, 1993.....25a-28a

APPENDIX A

UNITED STATES of America, Appellee,

v.

Jeffrey P. SANTOPIETRO, Thomas E. Porzio, Defendants,

Paul R. Vitarelli, Joseph J. Santopietro, Robert A. Giacomi, Fred L. Giusti, Jack R. Giacomi, and Perry A. Pisciotti, Defendants-Appellants.

Nos. 1333, 1489, 1334, 1326, 2335 and 1490,
Dockets 92-1334, 92-1349, 92-1356
92-1357, 92-1380 and 92-1381

United States Court of Appeals,
Second Circuit

Argued April 19, 1993.

Decided June 9, 1993.

Former city political leaders were convicted of bribery conspiracies and other offenses following jury trial by the United States District Court for the District of Connecticut, T.F. Gilroy Daly, J. Appeal was taken. The Court of Appeals, George C. Pratt, Circuit Judge, held that: (1) special skills enhancement in bribery guideline did not

apply merely because of defendant's status as a certified public accountant, and (2) bribery guideline applied to defendant convicted of receiving corrupt payments.

Convictions affirmed and sentences affirmed in part, vacated in part, and remanded.

1. Criminal Law - 1254

Special skills adjustment did not apply when sentencing former majority leader of city board of aldermen convicted of bribery and other offenses, even through defendant was certified public accountant, where defendant's offense was not determined under bribery guideline. U.S.S.G. §§ 1B1.7, 2C1.1, 2C1.1, comment (n.3), 2B1.3, 18 U.S.C.A.App.

2. Criminal Law - 1237

Sentencing former majority leader of city board of aldermen, convicted of receiving corrupt payments under bribery sentencing guideline was not clearly erroneous in light of evidence that defendant had corrupt intent; conduct was more akin to bribe-receiving than to gift-receiving. 18 U.S.C.A. §§ 666, 666(a)(2); U.S.S.G. §§ 2C1.1, 2c1.2, 18 U.S.C.A.App.

Judd Burstein, New York City (Gerald L. Shargel, New York City, of Counsel), for defendants-appellants Pisciotti & Santopietro.

Patrick Tomasiewicz, West Hartford, CT (Fazzano & Tomasiewicz, of Counsel), for defendant-appellant, Vitarelli.

David A. Moraghan, Torrington, CT, for defendant-appellant, Jack R. Giacomi.

Richard S. Cramer, Wethersfield, CT,

for defendant-appellant, Robert A. Giacomi.

Jules Sach, New York City, for defendant-appellant, Giusti.

Holly B. Fitzsimmons, Asst. U.S. Atty., D.Conn. (Albert S. Dabrowski, U.S. Atty., Amy B. Lederer, Asst. U.S. Atty., of Counsel), for appellee.

Before: PRATT and JACOBS, Circuit Judges, and WHITMAN KNAPP, Senior District Judge for the United States District Court for the Southern District of New York, sitting by designation.

GEORGE C. PRATT, Circuit Judge:

FACTS AND BACKGROUND

Joseph J. Santopietro became the may of Waterbury, Connecticut, in November 1985. His victory was due in part to a feud between factions of the city's Democratic party, which had been in power for the previous ten years. The

Republicans' uncertainty that they would be able to retain the power they had won fueled a "get it while we can" mentality among Santopietro and his close associates. Perry Pisciotti, former GOP town chairman who was close to Santopietro's family, arranged for Santopietro to use his political position to influence decisions by various city agencies in return for bank loans and cash payoffs from certain local businessmen. Santopietro was reelected twice, and the conspiracy expanded in 1988 to include other Waterbury politicians.

Benefits to certain bankers and land developers included zoning changes, subdivision approvals, confidential appraisal information for use in bidding on city-owned property, expedited treatment from city agencies, and input into appointments. In - return,

Santopietro and other members of his administration received hundreds of thousands of dollars disguised as loans, sales of options, real estate contract cancellations, and property leases.

Following a five-week trial before T.F. Gilroy Daly, Judge, in the United States District Court for the District of Connecticut, a jury found seven defendants guilty of conspiracy, bribery, and various counts of bank fraud, embezzlement, and tax evasion. Six of them have appealed.

Santopietro was convicted of bribery conspiracies, see 18 U.S.C. § 371; receiving corrupt payments, see 18 U.S.C. § 666(a)(1)(B); bank fraud, see 18 U.S.C. § 1344; embezzlement of federal grant monies, see 18 U.S.C. 665(a); and tax evasion, see 26 U.S.C. § 7201. He was sentences to 108 months' imprisonment, three years' supervised

release, a $25,000 fine and a $900 special assessment.

Pisciotti was convicted of conspiracy, see 18 U.S.C. § 371; bribery, see 18 U.S.C. § 666(a)(2); and bank fraud, see 18 U.S.S. § 1344. He was sentenced to 114 months' imprisonment, three years' supervised release, a $25,000 fine, and a $250 special assessment.

Paul Vitarelli, former president of Waterbury's Board of Aldermen, was convicted of conspiracy, see 18 U.S.C. § 371; receiving corrupt payments, see 18 U.S.C. § 666(a)(1)(B); and filing a false statement on his tax return, see 26 U.S.C. § 7206(1). He was sentenced to forty-one months' imprisonment, three years' supervised release and a $150 special assessment.

Robert Giacomi, former majority leader of Waterbury's Board of Aldermen,

was convicted of conspiracy, see 18 U.S.C. § 371; receiving corrupt payments, see 18 U.S.C. § 666(a)(1)(B); and filing a false statement on his tax return; see 26 U.S.C. § 7206(1). He was sentenced to fifty-one months' imprisonment, three years' supervised release, a $7500 fine, and a $150 special assessment.

Jack Giacomi, Waterbury's labor negotiations and brother of Robert Giacomi, was convicted of conspiracy, see 18 U.S.C. § 371; receiving corrupt payments, see 18 U.S.C. § 666(a)(1)(B); and filing a false statement on his tax return, see 26 U.S.C. § 7206(1). He was sentenced to eighteen months' imprisonment, three years' supervised release, a $4000 fine, and a $150 special assessment.

Fred Giusti, former majority leader of Waterbury's Board of Aldermen, was

convicted of conspiracy, see 18 U.S.C. § 371; and receiving corrupt payments, see 18 U.S.C. § 666 (a)(1)(B). He was sentenced to thirty-three months' imprisonment, three years' supervised release, and a $100 special assessment.

The defendants raise numerous issues on appeal, challenging various aspects of their trial and sentences. We have carefully considered all of the challenges to their convictions and concluded that non of them has any merit. We would affirm all of the judgments by summary order but for the existence of two sentencing issues that deserve brief comment: first, the imposition of a special skills enhancement to Robert Giacomi's sentence pursuant to U.S.S.G. § 3B1.3; second, the sentencing of Fred Giusti, who claims he received a "reward" rather than a "bribe", pursuant to U.S.S.G. §

2C1.1. For the reasons set forth below, we affirm all of the judgments except that with respect to Robert Giacomi we affirm the conviction but remand for resentencing.

DISCUSSION

A. Application of a Special Skills Enhancement to Robert Giacomi

[1] Robert Giacomi is a certified public accountant. The probation department's presentence report did not recommend any adjustments that would reflect this fact. The government, however, objected to this omission and argued that Robert Giacomi had used his special accounting skills to prepare false tax returns for himself, Santopietro, and Jack Giacomi. The government urged the court to impose a two-level adjustment under § 3B1.3. "Abuse of Position of Trust or Use of

Special Skill," which it did, increasing Giacomi's offense level from 20 to 22.

The § 3B1.3 enhancement was applied to Giacomi's sentence for the substantive bribery conviction, not to his sentence for filing a false tax return. His sentence for the bribery conviction was determined under § 2C1.1- "Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right," Application note 3 to § 2C1.1 provides "Do not apply § 3B1.3 *** except where the offense level is determined under § 2C1.1(c)(1), (2), or (3). In such cases, an adjustment from § 3B1.3 *** may apply."

Application note 3 is part of the commentary that explains and interprets how the guideline is to be applied and, as such, is binding on the courts. Stinson v. United States, ____ U.S. ___, 112 S.Ct. 1913, 123 L.Ed.2d 598 (1993)

(commentary that interprets or explains guideline is authoratative); see also U.S.S.G. § 1B1.7 ("Failure to follow such commentary could constitute an incorrect application of the guidelines, subjecting the sentence to possible reversal on appeal."). Since the application note expressly prohibits the imposition of § 3B1.3 enhancement to a sentence under § 2C1.1 unless the offense level is determined under any of the exceptions, the sentencing court erred in applying the § 3B1.3 enhancement. Therefore, we must vacate the sentence and remand for resentencing.

We note in passing that in pronouncing Robert Giacomi's sentence orally, Judge Daly mentioned only one sentence, without differentiating between the three counts of conviction. This practice is consistent with the sentencing guidelines, which direct the

court to determine and adjusted combined offense level applicable to all counts and impose one sentence as the total punishment. See U.S.S.G. § 3D1.1 ("Procedure for Determining Offense Level on Multiple Counts"); U.S.S.G. § 3D1.5 ("Determining the Total Punishment"); U.S.S.G. § 5G1.2 ("Sentencing on Multiple Counts of Conviction"). However, where the maximum allowable sentence on one of the component counts is less than the guideline sentence imposed, the statutory maximum is the guideline sentence for that count of conviction. U.S.S.G. § 5G1.2(b) (incorporating by reference § 5G1.1(a). Following these directions, Judge Daly, in preparing the written judgment and commitment order for Giacomi, indicated fifty-one months, the result of his guideline calculation, as the sentence on counts one and two,

and thirty-six months, the statutory maximum, for Giacomi's third count of conviction, filing a false tax return. See 26 U.S.C. § 7206(1). While it would have been better, given the effect of a statutory maximum on one of the counts, to refer specifically to each count at the sentencing hearing, we would not require a resentencing hearing merely because the court failed to do so. In this case, however, since we are already remanding for resentencing because of the application of the § 3B1.3 enhancement, Judge Daly can avoid any further problems by specifying at the resentencing proceeding the specific jail term being imposed on each count.

B. Failure to Differentiate Between a Bribe and a Reward.

[2] Fred Giusti argues that there is a "hole" in the sentencing guidelines because he was convicted of receiving a

"reward" under 18 U.S.C. § 666(a)(1)(B), but the applicable guideline, U.S.S.G. § 2C1.1, covers only "bribes". He claims that the trial court erred by failing to determine whether he received a bribe or a reward and sentence him accordingly. In response, the government argues that Giusti's characterization of the payments to him as "rewards" is incorrect, that any corrupt payment received in violation of 18 U.S.C. § 666 is a "bribe", and that the applicable guideline for § 666 offenses was correctly determined by the district court to be § 2C1.1.

Giusti argues that he was convicted for receiving a reward for past actions, not for receiving a bribe. While 18 U.S.C. § 666 is entitled "Theft of bribery concerning programs receiving Federal Funds", the statute itself criminalizes "corruptly *** accept[ing]

*** anything of value *** intending to be influenced or rewarded *** in connection with any *** transaction" of a local government official. 18 U.S.C. § 666(a)(1)(B). The indictment and the jury charge both tracked the language of the statute, including the language "intending to be influenced or rewarded", without differentiating between being "influenced" and being "rewarded". Giusti does not dispute the validity of the indictment or of the jury charge.

For all practical purposes, the differences between influencing and rewarding official action is one of timing. To influence, the payment is made before the official action; to reward, the payment is made afterwards. The evidence at trial revealed that Giusti was a member of Waterbury's Board of Aldermen from January 1, 1986, to

February 9, 1989, and that he received corrupt payments from July 5, 1988, to October 5, 1988. Since the time during which he received corrupt payments fell within his term in office, it is not clear that he received the payments only as a reward for past actions. Indeed, on this record a factfinder could reasonable infer that the payments were bribes, or rewards,or both. Therefore, on a factual level the evidence does not compel Giusti's assertion that he was the recipient of rewards rather than bribes.

Even if the payments Giusti received were in fact rewards made for past actions rather than bribes to influence future actions, he was correctly sentenced under § 2C1.1, entitled "Offering, Giving, Soliciting, or Receiving a Bribe; Extortion Under Color of Official Right". Giusti argues that §

2C1.1 covers only bribes, because it does not refer to rewards or gratuities and that § 2C1.2, entitled "Offering, Giving, Soliciting, or Receiving a Gratuity", should apply to him. The statutory index of the sentencing guidelines, which specifies which guideline applies to which crime, lists both §2C1.1 and §2C1.2 as applicable guidelines for 18 U.S.C. § 666(a)(1)(B) offenses. However, guideline § 2C1.2, which covers gratuities, does ·ot include a corrupt purpose as an element of the offense. See U.S.S.G. § 2C1.2, comment.(background). Since a corrupt purpose was an essential element of Giusti's conviction under 18 U.S.C. § 666,cf. United States v. Crozier, 987 F2d 893 (2d Cir.1993) (rejecting claim that former § 666(c) was bribery-only statute; court's failure to distinguish between bribe and gratuity

inconsequential since it clearly instructed jury on mens rea), sentencing pursuant to § 2C1.2 would be inappropriate, leaving § 2C1.1 as the only applicable guideline.

Section 2C1.1's failure to refer to "rewards" does not mean that there is a "hole" in the guidelines. Not every criminal statute has a guideline that mirrors its language; the statutory index simply "specified the guidelines section *** ordinarily applicable to the statute of conviction." U.S.S.G.APP.A,intro. The first circuit recently confronted a similar issue in United States v. Mariano, 983 F.2d 1150, 1158-60 (1st Cir.1993). There, the defendants claimed that they had given a gratuity, rather than a bribe, to a municipal official in violation of 18 U.S.C. §666(a)(2), and should be sentenced under the gratuity guideline,

§ 2C1.2. The district court rejected their argument and sentenced them under the bribery guideline, § 2C1.1. The first circuit upheld the district court's choice of guideline, because the offenses to which the defendants pled guilty "involved corrupt intent"; therefore, "the determination that their actions were more akin to bribe-giving than to gift-giving was not clearly erroneous". Mariano, 983 F.2d at 1159.

Giusti argues not that he was improperly convicted under 18 U.S.C. § 666, only that he was improperly sentenced. Because the jury's verdict establishes that Giusti had a corrupt intent, his actions are more akin to bribe receiving than to gift -receiving. As we view it, the crucial factor in this case is the corrupt purpose, not the timing of the payment. Therefore, sentencing Giusti under the bribery

guideline was not clearly erroneous.

CONCLUSION

Because the district court improperly applied a two-level enhancement under § 3B1.3 to Robert Giacomi, we vacate his sentence and remand for resentencing; his conviction, however, is affirmed. The judgments against Santopietro, Pisciotti, Vitarelli, Jack Giacomi, and Giusti are affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

[SEAL]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of July, one thousand nine hundred and ninety-three.

DOCKET NUMBERS 92-1334(L)

and 92-1349, 1381

UNITED STATES OF AMERICA,

Appellee,

-v.-

JEFFREY P. SANTOPIETRO, THOMAS E. PORZIO,

Defendants,

PAUL R. VITARELLI, JOSEPH J. SANTOPIETRO, ROBERT A. GIACOMI, FRED L. GIUSTI and JACK R. GIACOMI, and PERRY A PISCOTTI,

Defendants-Appellants

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by

Appellants Joseph Santopietro and

Perry Piscotti,

Upon consideration by the panel that decided the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT,

ELAINE B. GOLDSMITH, CLERK

By:

/s/

Carolyn Clark Campbell

Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA

v. [SEAL]

PAUL R. VITARELLI and JACK R. GIACOMI

Docket Number 92-1334(L) and 92-1380

NOTICE OF MOTION

for Adoption of Petition for Rehearing

MOTION BY:

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West Hartford, CT 06110

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OPPOSING COUNSEL:

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Assistant United States Attorney

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Hartford, CT 06103

Has consent of opposing counsel:

A. been sought? - Yes

B. been obtained? - No

Has service been effected? - Yes

Is oral argument desired? - Yes

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b)

Has argument date of appeal been set: N/A

A. by scheduling order?

B. by firm date of argument notice?

C. If Yes, enter date:_____

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below?

(See F.R.A.P. Rule 8) - N/A

Would expedited appeal eliminate need for this motion? - N/A

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard?

Judge or agency whose order is being appealed: Honorable T.F. Gilroy Daly, United States District Judge

Brief statement of the relief requested: The defendants Paul R. Vitarelli and Jack R. Giacomi request permission to adopt defendants' Petition for Rehearing filed by defendants Santopietro and Piscotti.

By: (Signature of attorney)

/s/

Signed name must be printed beneath

Patrick Tomasiewicz

Appearing for: (Name of party)

Paul R. Vitarelli

Jack R. Giacomi

Appellate or Petitioner:

[ ] Plaintiff [x] Defendant

Appellee or Respondent:

[ ] Plaintiff [ ] Defendant

Date: July 16, 1993

ORDER

IT IS HEREBY ORDERED that the motion be and it is hereby GRANTED.

[SEAL]

/s/

Pratt, J.

July 30, 1993

Date

Circuit Judge